IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HERBERT ELWOOD GILLILAND, III,	:	
	:	
	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION NO. 09-01621
	:	
CHAD HURLEY AND STEVE CHEN	:	
	:	
	:	
Defendants.	:	

OPPOSITION TO MOTION FOR LEAVE TO CONDUCT JURISDICTIONAL DISCOVERY AND REQUEST FOR BRIEFING SCHEDULING

I. INTRODUCTION

After twice forcing the Defendants to move to dismiss his claims for, *inter alia*, lack of personal jurisdiction and improper venue, the Plaintiff now seeks to further burden the Defendants, the founders of YouTube, by conducting jurisdictional discovery in support of claims that have no basis in fact. The Plaintiff's Motion for Leave to Conduct Jurisdictional Discovery and Request for Briefing Schedule (the "Plaintiff's Motion" or "Motion for Jurisdictional Discovery") should be denied because the Plaintiff has failed to meet the relevant standard, which requires him to demonstrate with "reasonable particularity" the existence of the requisite contacts between the Defendants and the Commonwealth of Pennsylvania. *See Toys 'R' Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (citation omitted). The allegations in the Amended Complaint are insufficient to meet this standard as it relates to specific personal jurisdiction over the Defendants, and the Plaintiff has failed to make any allegations that would support the exercise of general personal jurisdiction.

Even if the Court concludes that the Plaintiff has made the showing necessary to support jurisdictional discovery, the Plaintiff must demonstrate that the requested discovery would be "fruitful." *See Quantum Loyalty Systems, Inc. v. TPG Rewards, Inc.*, 2009 U.S. Dist. Lexis 120091, *35-36 (D. Del. 2009). In fact, as regards specific jurisdiction, the requested discovery would be futile, because the Plaintiff inexplicably seeks discovery regarding the contents of alleged telephone conversations in which he alleges he was personally involved – and which the Defendants assert never occurred. As regards general jurisdiction, the futility is even more apparent, because the indisputable facts of record demonstrate that the Defendants cannot be subject to general personal jurisdiction in Pennsylvania.

Alternatively, if the Court decides to grant the Plaintiff's requested relief, jurisdictional discovery should be limited to written interrogatories specifically addressing issues relevant to personal jurisdiction. If the Court is inclined to permit the Plaintiff to depose the Defendants, the depositions should take place in California, where the Defendants reside. The Defendants should not be forced to appear in Pennsylvania to be deposed in a nuisance lawsuit when this Court has not yet determined whether it even has personal jurisdiction over them.

II. RELEVANT BACKGROUND

On November 13, 2009, the Plaintiff commenced this action by filing a two count *pro se* Complaint against the Defendants in the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Action No. GD 09-021018. On December 9, 2009, the Defendants timely and properly removed the action to this Court. *See generally* Docket No. 1. The Defendants then moved to dismiss the Complaint for, *inter alia*, lack of personal jurisdiction and improper venue. *See generally* Docket Nos. 2-3. The Defendants attached as exhibits to their Motion to Dismiss the Declarations of Chad Hurley (the "Hurley Declaration") and Steve Chen (the "Chen

Declaration"), which contained averments showing that the Defendants had no contacts with Pennsylvania that would support the exercise of general personal jurisdiction.

On January 12, 2010, counsel entered their appearance on behalf of the Plaintiff and filed a Motion for Leave to File an Amended Complaint. *See generally* Docket Nos. 11-15. The Plaintiff's Amended Complaint was entered on the docket on January 27, 2010. *See generally* Docket No. 18. On February 4, 2010, the Defendants filed a Motion to Dismiss the Amended Complaint, again seeking dismissal of the Plaintiff's claims for, *inter alia*, lack of personal jurisdiction and improper venue. *See generally* Docket Nos. 19-20. The Defendants again attached the Hurley and Chen Declarations to demonstrate that the Court lacks general personal jurisdiction over the Defendants. *See generally* Docket No. 20, Exs. A, B.

On February 6, 2010, the Plaintiff filed his pending Motion for Jurisdictional Discovery, asserting that he is entitled to both serve written discovery and take the depositions of the Defendants. *See* Plaintiff's Motion, ¶¶ 10, 11, 14.

III. ARGUMENT

A. Standard for Jurisdictional Discovery

A plaintiff must meet two requirements in order to establish his entitlement to jurisdictional discovery:

First, a plaintiff must "present[] factual allegations that suggest 'with reasonable particularity' the possible existence of the requisite 'contacts between [the party] and the forum state….'" *Toys 'R' Us*, 318 F.3d at 456. Applying this standard, district courts in the Third Circuit "have denied jurisdictional discovery where the party that bears the burden of establishing jurisdiction failed to establish a 'threshold prima facie showing' of personal jurisdiction." *Parker v. Learn the Skills Corp.*, 2006 U.S. Dist. Lexis 12468, *11 (E.D. Pa. 2006) (citations omitted), *affirmed at* 219 Fed. Appx. 187 (3d Cir. 2007); *see also Knierim v. Siemens*

Corp., 2008 U.S. Dist. Lexis 26571, *32 (D. N.J. 2008) ("[A] court may deny a request for jurisdictional discovery when the plaintiff fails to establish a prima facie showing of personal jurisdiction.") (citation omitted).

Second, "a plaintiff must make a showing that discovery will be fruitful." *See Quantum Loyalty*, 2009 U.S. Dist. Lexis 120091, *35-36 (citing *In re Chocolate Confectionary Antitrust Litigation*, 602 F. Supp. 2d 538, 572 (M.D. Pa. 2009)); *see also Belden Technologies, Inc. v. LS Corp.*, 626 F. Supp. 2d 448, 457 (D. Del. 2009) ("A court must determine whether certain discovery avenues, 'if explored, might provide the 'something more' needed' to establish personal jurisdiction.") (citing *Toys 'R' Us*, 318 F.3d at 456); *Clark Capital Management Group, Inc. v. Navigator Investments, LLC*, 2006 U.S. Dist. Lexis 66989, *20-21 (E.D. Pa. 2006) (denying request for jurisdictional discovery where the discovery that the plaintiff sought would not assist the plaintiff in establishing personal jurisdiction over the defendant).

B. The Plaintiff is Not Entitled to Discovery Regarding the Defendants' Alleged Contacts Relevant to Specific Personal Jurisdiction

1. The Plaintiff has Failed to Establish with "Reasonable Particularity" the Existence of the Requisite Contacts between the Defendants and Pennsylvania

The Plaintiff identifies only two contacts that are arguably relevant to the Court's specific personal jurisdiction analysis – (1) the Plaintiff's alleged November 2004 phone call to Defendant Hurley at PayPal's offices in California, during which the purported oral agreement was formed (*see* Am. Compl., ¶¶ 22-31; Compl. ¶¶ 4, 9); and (2) the Defendants' alleged February 2005 phone call from California to the Plaintiff in Pittsburgh, during which the Defendants allegedly asked the Plaintiff additional questions about the YouTube concept and

"reaffirmed" the purported oral contract.[1] *See* Am. Compl., ¶¶ 32-37; Compl. ¶¶ 5-7; *see also* Defendants' Memorandum of Law in Support of Motion to Dismiss Amended Complaint, pp. 5-6. While the Defendants deny these allegations, the Defendants' Motion to Dismiss accepted the Plaintiff's story as true, and demonstrated that these allegations are insufficient as a matter of law to support the exercise of personal jurisdiction over the Defendants. *See* Defendants' Memorandum of Law in Support of Motion to Dismiss Amended Complaint, pp. 9-17.

In summary: the purported November 2004 telephone call, during which the alleged oral contract was formed, cannot constitute a requisite contact because the Plaintiff concedes that he initiated the call to Defendant Hurley in California. *See* Am. Compl., ¶¶ 22; Compl. ¶¶ 4, 9; *see also O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 316-17 (3d Cir. 2007) (the "unilateral activity" of someone other than the defendant cannot constitute purposeful availment); *see also* Defendants' Memorandum of Law in Support of Motion to Dismiss Amended Complaint, pp. 10-11. This leaves only the alleged February 2005 phone call, which is the focus of the Plaintiff's Motion for Jurisdictional Discovery. *See* Plaintiff's Motion, ¶ 10. This phone call cannot support the exercise of personal jurisdiction because (1) the phone call was not "instrumental in either the formation of the contract or its breach," *see General Elec. Co. v. Deutz AG*, 270 F.3d 144, 150 (3d Cir. 2001); and because (2) "occasional contacts made [by the defendant] in the process of negotiating and fulfilling the contract do not constitute

[1] The Amended Complaint also alleges that that the Defendants purportedly "agreed to perform their part of the Contract by tendering the 1% to Plaintiff in Pittsburgh, Pennsylvania." *See* Am. Compl., ¶ 52. This allegation does not constitute a separate contact between the Defendants and Pennsylvania, and it is, in any event, insufficient as to support the exercise of personal jurisdiction. *See* Defendants' Memorandum of Law in Support of Motion to Dismiss Amended Complaint, pp. 12-13. Moreover, the Amended Complaint alleges that the Plaintiff mailed several letters and placed several phone calls "to find out when he would be receiving his 1% of the proceeds per the terms of the Contract," but the Defendants did not respond. *See* Am. Compl., ¶¶ 46-48. Although it is not clear that the Plaintiff is relying on such phone calls or letters in an attempt to establish personal jurisdiction, it is clear that these contacts are insufficient as a matter of law because, *inter alia*, they constitute "unilateral activity" of the Plaintiff and are not "instrumental in the formation of the contract or its breach." *See* Defendants' Memorandum of Law in Support of Motion to Dismiss Amended Complaint, pp. 9-11.

'voluntary and purposeful' actions towards the forum state." *Utilitech, Inc. v. Somerset Med. Ctr.*, 2006 U.S. Dist. Lexis 40126, *22 (E.D. Pa. 2006) (citation omitted); *see also* Defendants' Memorandum of Law in Support of Motion to Dismiss Amended Complaint, pp. 11-12 (discussing how the alleged February 2005 phone call from the Defendants to the Plaintiff cannot support the exercise of specific personal jurisdiction).

2. The Plaintiff Does Not, and Cannot, Establish that Jurisdictional Discovery would be Fruitful

Even if the Plaintiff could establish with "reasonable particularity" the existence of the requisite contacts between the Defendants and Pennsylvania, the Plaintiff does not, and cannot, establish that the requested discovery would be fruitful. Indeed, the Plaintiff concedes that he is unsure "what specific additional information would be ascertained as a result of the requested discovery." *See* Plaintiff's Motion, ¶ 11. Furthermore, by the Plaintiff's own allegation, he was personally involved in both contacts arguably relevant to the personal jurisdiction analysis – the alleged November 2004 telephone call, in which the alleged contract was formed, and the February 2005 telephone call. *See* Am. Compl., ¶¶ 22-31, 32-37. It defies reason that the Plaintiff would need to conduct discovery regarding the contents of alleged phone calls, and of a purported contract, to which he was a party. In addition, it is clear that such discovery would not improve his jurisdictional allegations. In fact, it would be entirely futile because the Defendants' position is that: (1) to the best of their recollection, they have never spoken to the Plaintiff; (2) the telephone conversations alleged in the Complaint and Amended Complaint never occurred; and (3) the Plaintiff was in no way involved in the Defendants' creation of the YouTube concept, trade name, or business.

The Plaintiff's request for jurisdictional discovery regarding the Defendants' alleged contacts relevant to specific personal jurisdiction should therefore be denied.

C. The Plaintiff is Not Entitled to Discovery Regarding the Defendants' Alleged Contacts Relevant to General Personal Jurisdiction

1. The Plaintiff has Failed to Establish with "Reasonable Particularity" the Existence of the Requisite Contacts between the Defendants and Pennsylvania

The Plaintiff also claims that he is entitled to discovery regarding the Defendants' alleged contacts relevant to general personal jurisdiction. This argument is even more tenuous for several reasons. First, the Plaintiff ignores that the Defendants are individuals, not corporations. Jurisdictional discovery typically concerns whether a corporation did business within a state, and the need for such discovery diminishes where the defendants are individuals. *See Quantum Loyalty*, 2009 U.S. Dist. Lexis 120091, *14

Second, as discussed at length in Defendants' Motion to Dismiss, under Pennsylvania law a court may exercise general personal jurisdiction over an *individual* defendant in only three circumstances: (1) the individual's "[p]resence in this Commonwealth at the time when process is served"; (2) the individual's "[d]omicile in this Commonwealth at the time when process was served"; or (3) the individual's "[c]onsent." *See Defendants' Memorandum of Law in Support of Motion to Dismiss Amended Complaint*, pp. 7-8 (citing 42 Pa. C.S.A. § 5301(a)(1)(i)-(iii)). None of these criteria for general jurisdiction are met in this case, and the Plaintiff does not allege otherwise.[2]

[2] The Plaintiff was in possession of the Hurley and Chen Declarations, which establish that there is no basis for general personal jurisdiction over the Defendants, prior to filing his Amended Complaint. *See generally* Docket No. 3, Exs. A, B. Yet, in the Amended Complaint, the Plaintiff nowhere suggests, even on information and belief, that the contents of these Declarations is somehow false or that general personal jurisdiction exists over the Defendants.

2. The Plaintiff Does Not, and Cannot, Establish that Jurisdictional Discovery would be Fruitful

The Plaintiff supports his request for jurisdictional discovery by asserting that he should be permitted to investigate the Defendants' "general contacts" and "cross-examine" the Defendants' regarding their Declarations. This proposed discovery would clearly be futile. First, the Plaintiff concedes that the Defendants are domiciled in California. *See* Am. Compl., ¶¶ 6-7. Second, the Plaintiff also knows that the Defendants were served in California because he arranged for service. This is a matter of record and cannot be disputed. *See generally* Docket No. 1, Ex. A. Finally, the Defendants have made clear that they do not consent to jurisdiction in the Courts of Pennsylvania. *See* Hurley Declaration, ¶ 6; Chen Declaration, ¶ 5. The Plaintiff is not going to somehow "cross-examine" the Defendants into consenting to jurisdiction. *See Quantum Loyalty*, 2009 U.S. Dist. Lexis 120091, *36 (denying request for jurisdictional discovery where the "[defendant's] declaration submitted in support of his motion to dismiss suggests that discovery would not yield information favorable to extending personal jurisdiction over him").

Accordingly, the Plaintiff's request for jurisdictional discovery to investigate the Defendants' "general contacts" with Pennsylvania, and to challenge the Defendants' Declarations, should be denied.

D. If the Court Grants the Plaintiff's Request for Jurisdictional Discovery, the Scope of such Discovery should be Limited

If this Court decides to grant the Plaintiff's request for jurisdictional discovery, the Court should limit the discovery to written interrogatories specifically addressing issues relevant to personal jurisdiction. *See Streamlight, Inc. v. ADT Tools, Inc.*, 2003 U.S. Dist. Lexis 19843, *14 (E.D. Pa. 2003) (citing *Molnlycke Health Care AB v. Dumex Med. Surgical Prods.*,

Ltd., 64 F. Supp. 2d 448, 454 (E.D. Pa. 1999)) (holding that the scope of jurisdictional discovery is within the trial court's discretion).

The Plaintiff asserts that he needs jurisdictional discovery regarding, *inter alia*, "the substance of the telephone conversations set forth in Plaintiff's Amended Complaint, the level of specificity with regard to the underlying YouTube venture, [and] any representations and assurances concerning the Defendants' obligation to pay Plaintiff 1% of the proceeds of that venture…." *See* Plaintiff's Motion, ¶ 11. This discovery is clearly aimed at the merits of this case, and is not reasonably tailored to addressing the personal jurisdiction analysis. The Plaintiff could certainly elicit the information relevant to both general and specific personal jurisdiction through simple written interrogatories. There is no need to further burden the Defendants by forcing them to submit to depositions that would be entirely futile and would not assist the Plaintiff at all in bolstering his insufficient jurisdictional allegations.

Finally, if the Court is inclined to permit the Plaintiff to depose the Defendants, the depositions should take place in California, where the Defendants reside. The Defendants should not be compelled to come to Pennsylvania for depositions when the Court has not yet determined that it has personal jurisdiction over them.

IV. CONCLUSION

For the foregoing reasons, Defendants Chad Hurley and Steve Chen respectfully request that this Court deny the Plaintiff's Motion for Jurisdictional Discovery.

Dated: February 16, 2010

/s/ Ralph A. Finizio

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Opposition to Motion for Leave to Conduct Jurisdictional Discovery and Request for Briefing Schedule was served via the Court's electronic filing system, on February 16, 2010, upon the following::

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